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No. 102.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1925.

RHEDEREI M. JEBSEN COMPANY, *Appellant*,

vs.

THE UNITED STATES, *Appellee*.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLANT.

STATEMENT OF THE CASE.

This is a suit by the appellant against the United States. The original petition was filed in the Court of Claims on June 29, 1923, and amended on February 19, 1924. The petition alleged that appellant was a duly organized and incorporated joint stock company under the laws of Schleswig-Holstein, Germany, and registered at the port of Apenrade prior to the outbreak of the European War; that pursuant to the Treaty of Versailles and the plebiscite held thereunder, the City of Apenrade and the province of Schleswig-Holstein became a part of the Kingdom of Denmark and claimant is now an incorporated joint stock company under the laws of said Kingdom:

The petition alleged:

> "That at the outbreak of the war in Europe in 1914, the said company then owned and had in commission an eighteen hundred ton merchant steamship known as the Johanne, of the gross tonnage of 1,530.88 register tons, net tonnage of 952.06, length of 77.96 meters, breadth 11.03 meters, and depth 5.51 meters, and built at Lubeck, Germany, in 1903. When war was declared between Germany and France and the other allied powers, the said steamship took refuge in the harbor at Manila, Philippine Islands, and remained there until the same was seized by the Government, as hereinafter set forth."

It is alleged that on the day of the declaration of war, April 6th, 1917, this steamship was seized in the harbor at Manila Bay by the authorities of the United States Government and held and used until June 30, 1917, on which date the title to the property was taken over by the Government of the United States by virtue of an executive order of the President issued on June 30, 1917, made pursuant to a resolution of Congress passed on May 12, 1917.

The joint resolution referred to reads as follows:

> "Joint resolution authorized the President to take over for the United States the possession and title of any vessel within its jurisdiction, which at the time of coming therein was owned in whole or in part by any corporation, citizen, or subject of any nation with which the United States may be at war, or was under register of any such nation, and for other purposes.
>
> "*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,* That the President be, and he is hereby, authorized to take over to the United States the immediate possession and title of any vessel within the jurisdiction thereof, including the Canal Zone, and all territories and insular possessions of the United States except the American Virgin Islands, which at the time of coming into such jurisdiction was owned *in whole or in part* by any corporation, citizen or subject of any nation with which the United States may be at war

when such vessel shall be taken, *or* was flying the flag of *or* was under register of any such nation *or* any political subdivision or municipality thereof; and through the United States Shipping Board or any department or agency of the Government to operate, lease, charter, and equip such vessel *in any service* of the United States, or *in any commerce, foreign or coastwise.*

"Sec. 2. That the Secretary of the Navy be, and he is hereby, authorized and directed to appoint, subject to the approval of the President, a board of survey whose duty it shall be to ascertain the actual value of the vessel, its equipment, appurtenance, and all property contained therein, at the time of its taking, and to make a written report of their findings to the Secretary of the Navy, who shall preserve such report with the records of his department. These findings shall be considered as competent evidence *in all proceedings on any claim for compensation.*"

This was followed by the executive order of the President, as follows:

"AND WHEREAS, the following vessels were, at the time of coming into the jurisdiction of the United States, owned *in whole or in part* by a corporation, citizen or subject of the Empire of Germany, a nation with which the United States is now at war, *or* were flying a flag of *or* under the register of the Empire of Germany, or of a political subdivision or municipality thereof.

(Here follows a list of 99 ships, including the Johanne).

"It is therefore ordered that through the United States Shipping Board there be taken over to the United States the *possession and title* of the aforementioned vessels. The United States Shipping Board is further hereby authorized to repair, equip and man the said vessels; to operate, lease, or charter the same *in any service* of the United States, *or in any commerce, foreign or coastwise;* and to do and perform any and all things that may be necessary to accomplish the purposes of the Joint Resolution above set forth."

R. pp. 3 and 4.

It is alleged that this boat was taken over and used from April 6, 1917, to June 30, 1917, under an implied promise to pay for the value of its use, and that when the title was taken over under the joint resolution and executive order referred to, on June 30th, it was under an implied promise to pay the value thereof. It is alleged that the value of the use of this ship from April 6, 1917, to June 30, 1917, was Twenty-Three Thousand Dollars ($23,000.00), and that this ship was reasonably worth, at the time the title was taken by the United States Government on June 30, 1917, One Hundred and Seventy-Four Thousand Six Hundred Dollars ($174,600.00).

The name of said ship at the time it was owned by the petitioner was Johanne. After the title was taken over by the United States Government it was changed to Iosco.

Petitioner prayed for a recovery on the matters referred to in the sum of One Hundred Ninety-Seven Thousand Six Hundred Dollars ($197,600.00).

R. pp. 1 to 3.

The government filed a demurrer on two grounds;

1st—Because the petition failed to state a cause of action against the United States, and

2d—Because the cause of action was not within the jurisdiction of the Court of Claims.

R. p. 5.

The court sustained the demurrer and dismissed the petition. An appeal was properly prayed and granted to this Court.

R. pp. 6 to 13.

ASSIGNMENT OF ERROR.

The Court of Claims erred in sustaining the demurrer and dismissing appellant's bill because the United States Government appropriated appellant's property by legislative authority under an implied promise to pay for same, and appellant is entitled to recover the value thereof.

THERE WAS AN IMPLIED PROMISE TO PAY FOR THIS PROPERTY.

The property in controversy was taken over by the United States Government under authority of an Act of Congress, and used for governmental purposes. It is not insisted that the United States had any claim to this property prior to the seizure under the Act of Congress referred to. Appellant insists that there was a promise to pay implied from the lawful taking of this property in the manner referred to.

In the case of *United States vs. North American Transportation and Trading Company*, 253 U. S., 330, this Court said:

> "When the government, without instituting condemnation proceedings, appropriates for a public use, under legislative authority, private property to which it asserts no title, it impliedly promises to pay therefor."

It is not necessary to show any express promise, or any sort of agreement with reference to paying. The promise to pay is implied from the taking. *United States v. Cress*, 243 U. S. 316. *United States v. Great Falls Mfg. Co.*, 112 U. S. 645. *United States v. Lynah*, 188 U. S. 445.

The Court of Claims held, however, that there could be no implied promise to pay because this property was taken under the *war power* of the government. The Court did not hold, however, that the property was confiscated. The Court said:

> "We do not think it necessary to assert that there was a confiscation, nor to deny that the Congress may have intended that the United States would at some time account for the vessels or their ascertained value." R. pp. 12 and 13.

We know of but three ways that the government could rightfully have taken over this property as the private property of an enemy:

(a) By confiscation.
(b) By sequestration to hold in trust, or
(c) Under an implied promise to pay.

We shall hereinafter discuss fully the question of confiscation.

Asuming for the present that the property was not confiscated, we submit that there was an implied promise to pay, nothwithstanding it was taken over under authority of Congress in the exercise of its war power conferred by the Constitution.

In the case of *United States v. Russell*, 12 Wall. 623, it is expressly held that property taken from American citizens by officers of the government for use during the Civil War was rightfully taken in the exercise of the war powers of the government, and there arose from this taking an implied promise to pay. It appears that Russell was required to use his ships in the government service for a period of time. The order requiring this service reads as follows:

> "Imperative military necessity requires the service of your steamer for a brief period; your captain will report at this office at once in person, first stopping the receipt of freight, should the steamer be so doing."

Other ships were taken under similar orders. These ships were used by the government and suit was brought in the Court of Claims to recover compensation for their use. Among other things, the Court said:

> "Such a taking of private property by the Government, when the emergency of the public service in time of war or impending public danger is too urgent to admit of delay, is everywhere regarded as justified, if the necessity for the use of the property is imperative and immediate and the danger, as heretofore described, is impending; and it is equally clear that the taking of such property under such circumstances creates an obligation on the part of the Government to reimburse the owner to the full value of the service. Private rights, under such extreme and imperious circumstances, must give way for the time to public good, but the Government must make full restitution for the sac-

rifice. Beyond doubt, such an obligation *raises an implied promise on the part of the United States to reimburse the owner for the use of the steamboats* and for his own services and expenses, and for the services of the crews during the period the steamboats were employed in transporting government freight pursuant to those orders. *Indebitants assumpsit* is founded upon what the law terms *an implied promise on the part of the defendant to pay what, in good conscience he is bound to pay to the plaintiff.* But the law will not imply a promise to pay unless some duty creates such an obligation, and it never will sustain any such implication, in a case where the act of payment would be contrary to duty or contrary to law."

In that case, as in the case at bar, it was insisted that the question of compensation for the use of these vessels was a *political* question to be settled by Congress and not a *judicial* question to be settled by the courts. In discussing this question, the Court said:

> "Tested by those rules it is quite clear that the obligation in this case to reimburse the owner of the steamboats was of a character to raise an implied promise on the part of the United States to pay a reasonable compensation for the services rendered, and if so, then it follows that the decree was properly made in favor of the plaintiff, unless it appears that the adjustment of the claim belonged to Congress or to the Executive Department, and not to the Court of Claims."

After a full discussion of the Act of Congress authorizing suits in the Court of Claims, the Court concluded as follows:

> "Viewed in that light, the case is free of all difficulty, as the jurisdiction of the court, by the express words of the Act of Congress, extends to claims founded upon an implied contract as well as upon that which is expressed."

In the recent case of *Campbell v. United States,* 69 L. ed. (U. S. S. C. Adv. Ops., Jan. 1, 1925), p. 128, this Court approved the recovery in favor of the plaintiff for property taken by the United States Government during the world war. The Court said:

"In 1918 the United States, to aid in the prosecution of the war, had determined to build a nitrate plant at Ancor in the Little Miami Valley, near Cincinnati, Ohio. In order to get a site, it had taken possession of many parcels of land making up a large tract, adjoining plaintiff's estate of 69.73 acres. August 31, 1918, an officer of the Army, acting under the direction of the Secretary of War, and without obtaining plaintiff's consent, or instituting condemnation proceedings or making any compensation therefor, took possession of a part of plaintiff's land, which was separated from the remainder by a public road."

And as a result of this taking, the Court said:

"And from the taking there arose an implied promise by the United States to compensate plaintiff for his loss."

It is true the case at bar differs from the cases cited, in that the ships taken under the joint resolution of Congress were owned "in whole or in part" by enemies, but this would make no difference in the principle announced if the ships were not *confiscated* as enemy property. If the joint resolution, in the light of our past and contemporaneous history shows that compensation was intended, or if our treaty obligations, or international law and national good faith require that compensation should be paid for these ships, then the law implies a promise to pay, and the question is one for judicial determination, notwithstanding the property was taken by authority of Congress in the exercise of its war power.

It must be remembered that Congress was dealing not only with property owned by enemies, but with property in which American citizens or neutrals might have an interest, inasmuch as the resolution authorized the seizure of ships owned by an enemy *in whole or in part*. Undoubtedly the seizure, under this resolution, of a ship in which an American citizen or a neutral had an interest, would give a right of action in the Court of Claims under the Tucker Act. Inasmuch as no distinction is made in the resolution be-

tween the interests owned by enemies and Americans or neutrals, it results that any right that an American or neutral might have to sue in the Court of Claims was not intended to be denied to an enemy, with reference to any interest in a ship seized under this resolution.

THE PROPERTY WAS NOT CONFISCATED.

Neither the declaration of war nor the existence of a state of war authorized the confiscation of the private property of an individual enemy. The confiscation of such property must be expressly authorized by an Act of Congress. *Brown v. United States,* 8 Cranch, 110.

It could hardly be insisted that the joint resolution authorizing the taking over of this property can be construed as authorizing its *confiscation.* The Court of Claims disclaims any such conclusion.

It will be observed that Congress authorized the seizure of any ship owned *in whole or in part* by any subject or citizen of any nation with which the United States was at war. Under this resolution a ship was subject to seizure if an enemy owned *any interest* whatsoever in it. A ship in which an American or a neutral owned a nine-tenths interest, and a German or Austrian a one-tenth interest, was just as much subject to seizure as a ship owned entirely by an enemy.

It will be further observed that the resolution provides that any ship might be seized, if owned *in whole or in part* by an enemy, *at the time it entered* any of the American ports named in the resolution. A ship owned by a German or Austrian might have entered an American port a year before the declaration of war by the United States, and his entire interest might have been acquired in the meantime by Americans or neutrals. Nevertheless, under this resolution such a ship was subject to seizure. We cannot, of course, assume that either Congress or the President intended to take *without compensation* the property of an American citizen, or a neutral, or property in which an American citizen or a neutral had any interest. Whatever

power Congress may have had with reference to the confiscation of the private property of an enemy, it cannot be said that Congress had the power to take the property of a neutral, or an American citizen, without compensation. The Court of Claims in its opinion erroneously states that in the exercise of its war power Congress is not limited by the 5th and 6th amendments. This Court has held directly to the contrary. In *Hamilton v. Kentucky Distilleries Company*, 251 U. S. 146, this Court said:

> "The war power of the United States, like its other powers and like the police power of the states, is subject to applicable constitutional limitations."

The same rule is laid down in *United States v. Cohen Grocery Company*, 255 U. S. 81.

We cannot assume that Congress intended to disregard the rights of American citizens or neutrals under the 5th amendment. *Baender v. Barnett*, 255 U. S. 224.

Inasmuch as the Act applies equally to the interests of neutrals, Americans, and enemies, we must assume that Congress intended that the owners of these ships should receive compensation therefor. This is further shown by Section 2 of the resolution, in which it is provided that a board shall be appointed to value this property, and that a written report as to such valuation shall be filed with the Secretary of the Navy, and—"these findings shall be considered as competent evidence *in all proceedings in any claim for compensation.*"

We cannot assume that Congress or the President intended to confiscate this property, or take it without compensation, for the following additional reasons:

(a) Such a course would have been inconsistent with the traditional policy of the United States.

(b) Under well-established principles of international law, said ships could only have been taken as prizes of war, without compensation, after condemnation by a prize court.

(c) The taking of these ships without compensation would have been inconsistent with the declaration of the Hague Conferences of 1899 and 1907.

(d) The messages of the President, and the Congressional debates and reports show that confiscation was not intended.

We will discuss these propositions in the order stated.

THE CONFISCATION OF THIS PROPERTY WOULD BE INCONSISTENT WITH THE TRADITIONAL POLICY OF THE UNITED STATES.

In the *Buena Ventura*, 175 U. S. 384, at 388, Mr. Justice Peckham said:

> "It is, as we think, historically accurate to say that *this Government has always been, in its views, among the most advanced of the governments of the world in favor of mitigating, as to all non-combatants, the hardships and horrors of war.* To accomplish that object *it has always advocated* those rules which would in most cases *do away with the right to capture the private property of an enemy on the high seas.* 3 Wharton Int. Law Digest, Sec. 342. The refusal of this Government to agree to the declaration of Paris was founded, in part, upon the refusal of the other Governments to agree to the proposition exempting private property not contraband from capture upon the seas."

It would unnecessarily extend this discussion to quote from the messages and State papers of all the American Presidents and statesmen who have advocated the exemption of private merchant property for capture and confiscation at sea in time of war. Among the American statesmen who have made efforts to this end are Adams, Franklin, Jefferson, Hamilton, Calhoun, Van Buren, Pierce and Marcy.

President McKinley, in his annual message of December 5, 1898, made the following recommendation:

> "The experiences of the last year bring forcibly home to us a sense of the burdens and the waste of war. We desire, in common with most civilized nations, to reduce to the lowest possible point the damage sus-

tained in time of war by peaceable trade and commerce. It is true we may suffer in such cases less than other communities, but all nations are damaged more or less by the state of uneasiness and apprehension into which an outbreak of hostilities throws the entire commercial world. It should be our object, therefore, to minimize, so far as practicable, this inevitable loss and disturbance. This purpose can probably best be accomplished by an international agreement *to regard all private property at sea as exempt from capture or destruction by the forces of belligerent powers. The United States Government has for many years advocated this humane and beneficient principle,* and is now in a position to recommend it to other powers without the imputation of selfish motives. I, therefore, suggest for your consideration that the executive be authorized to correspond with the governments of the principal maritime powers with a view of incorporating into the permanent law of civilized nations *the principle of the exemption of all private property at sea,* not contraband of war, from capture or destruction by belligerent powers."

President Roosevelt in his annual message on December 7, 1903, quoted this extract from the message of President McKinley, and added:

"I cordially renew this recommendation."

He then quoted an extract from the opinion of Mr. Justice Peckham, and added:

"I advocate this as a matter of humanity and morals. It is anachronistic, when private property is respected on land, that it should not be respected at sea."

CONFISCATION OF THESE SHIPS, WITHOUT CONDEMNATION BY A PRIZE COURT, UNAUTHORIZED BY INTERNATIONAL LAW.

We cannot assume that Congress intended to violate well established principles of international law. In the case of *Ware, Administrator v. Hylton,* 3 Dallas, 199 (1 L. ed., pp. 568, 603), Mr. Justice Wilson said:

"When the United States declared their independence, they were bound to receive the law of nations in its modern state of purity and refinement."

In the case of *MacLeod v. United States*, 229 U. S. 416, 435 (57 L. ed., 1260, 1268), this Court said:

"The statute should be construed in the light of the purpose of the government to act within the limitation of the principles of international law, the observance of which is so essential to the peace and harmony of nations, and it should not be assumed that Congress proposed to violate the obligations of this country to other nations, which it was the manifest purpose of the President to scrupulously observe, and which were founded upon the principles of international law."

By a long settled rule of international law a ship may not be legally confiscated until it is condemned by a prize court. Hon. John Bassett Moore, in the 7th Volume of his digest of International Law, page 630, in discussing this subject, says:

"When a vessel is captured, the rule is to bring her into some convenient port of the government of the captor for adjudication. The mere fact of capture does not work a transfer of title, and until there is a sentence of condemnation or restitution, the captured vessel is held by the government in trust for those who, by the decree of the court, may have the ultimate right to it.

"Demand against property captured as prize of war *must be adjusted in a prize court.* The property arrested as prize is not attachable at the suit of private parties; and if such party have claims which in their opinion override the rights of the captors, they must present them to the prize court for settlement. The jurisdiction of a prize court over a captured vessel is determined by the capture and not by the filing of a libel.

"The duty of a captor is to institute judicial proceedings for the condemnation of his prize without unnecessary delay, and if he fails in this the court may, in case of restitution, decree demurrage against him as damages. This rule is well settled. *Slocum v. Mayberry, 2 Wheat. 1; The Appollon, 9 Wheat. 362; the*

Lively, 1 Gall. 314; The Corier Maritimo, 1 Rob. 287.

"A Chilean cruiser having seized on the high seas certain paper currency destined for the Peruvian Government, and the Chilean forces in Peru having afterwards, without judicial condemnation of the property, which was claimed to belong to citizens of the United States, put such currency into enforced circulation in Peru in payment for supplies taken by the Chilean army, the Government of the United States said: 'The capture of the property having been made on the high seas and no prize court having inquired into the authority of the captor or the liability of the property under the public law to be seized, that act might in strictness be regarded as practical in its character. *By the maritime law of nations universally and immemorially received, there is an established method of determination, whether the capture be or be not lawful prize.* Before the ship or goods can be disposed of by the captor, *there must be a regular judicial proceeding, wherein both parties may be heard, and condemnation had thereon as prize in a court of admiralty, judging by the law of nations and treaties.*' Wildman's International Law, Vol. 2, p. 352."

This Court, in the case of *Oakes v. United States*, 174 U. S., 778, said:

"By the law of nations, *as recognized and administered in this country,* when movable property in the hands of the enemy, used, or intended to be used, for hostile purposes, is captured by land forces, the title passes to the captors as soon as they have reduced the property to firm possession; but when such property is captured by naval forces, a judicial decree of condemnation is usually necessary to complete the title of the captors. *1 Kent. Com. 102, 110; Halleck's International Law, Chap. 19, Sec. 7, Chap. 30, Sec. 4, Kikr v. Lynd, 106 U. S. 315, 317 (27: 193, 195).*"

As we shall hereinafter show, this principle of international law was confirmed by a solemn convention, *to which both the United States and Germany were parties,* at the Hague Conference in 1907.

Under the resolution and executive order of the Presi-

dent, these ships were seized and the title taken over by the United States without any judicial proceeding—without due process—without an opportunity for the owners to be heard and assert their rights in any court. The President determined by his executive order that these ships came within the terms of the resolution of Congress. He was authorized to do this by the resolution. It was obviously not intended by this summary proceeding to deny to the owners of these ships their day in court. It must have been assumed that they would be permitted to assert their claims for compensation in the proper tribunal. It cannot be assumed that either Congress or the President intended to violate the laws of nations or our treaty obligations.

THE TAKING OF THESE SHIPS WITHOUT COMPENSATION WOULD BE INCONSISTENT WITH THE DECLARATION OF THE HAGUE CONVENTION OF 1907.

Article 46 of the agreement with reference to "The Laws and Customs of War on Land" adopted at the Hague Convention in 1899, provides as follows:

> "Family honors and rights, individual lives and *private properties* as well as religious convictions and liberties must be respected.
>
> "Private property cannot be confiscated." *Scott's Hague Conventions and Declarations of 1899 and 1907*, page 123.

This was re-enacted at the Convention of 1907.

The delegates from the United States to the Hague Convention of 1907, received the following instructions:

> "Since the conference has its chief reason of existence in the heavy burdens and cruel wastes of war, which nowhere affect innocent private persons more severely or unjustly than in the damage done to peaceable trade and commerce, *especially at sea*, the question of exempting private property from destruction or capture on the high seas would seem to be a timely one for consideration.

"As the United States has for many years advocated the exemption of all private property not contraband of war from hostile treatment, you are authorized to propose to the conference the principle of extending to strictly *private property at sea* the immunity from destruction or capture by belligerent powers which such property already enjoys on land *as worthy of being incorporated in the permanent law of civilized nations.*"

At that convention Article I of Convention VI was adopted on October 18, 1907. It provides as follows:

"When a merchant ship belonging to one of the belligerent Powers is at the commencement of hostilities in any enemy port, it is desirable that *it should be allowed to depart freely, either immediately or after a reasonable number of days of grace,* and to proceed, after being furnished with a pass, direct to its port of destination or to any other port indicated.

"The same rule should apply in the case of a ship which has left its last port of departure before the commencement of the war and entered a port belonging to the enemy while still ignorant that hostilities had broken out."

Article 2 provides:

"A merchant ship unable, owing to circumstances of *force majeure,* to leave the enemy port within the period contemplated in the above article, *or which was not allowed to leave, cannot be confiscated.*

"The belligerent may only *detain* it, without payment of compensation, but subject to the obligation of restoring it after the war, *or requisition it on payment of compensation.*" *Scott's Hague Conventions and Declarations of 1899 and 1907,* page 141.

This agreement was ratified by nearly all the civilized nations of the world, except the United States.

It was not signed by the American delegates because of the provision in Article 1, allowing the detention of ships by a belligerent or requisition on payment of compensation. In other words, *the American delegates did not be-*

lieve that the ships should be detained at all. Hyde's International Law—Sec. 764.

This was in accordance with the declared policy of this Government. The practice of allowing enemy merchant ships a reasonable number of days of grace in which to return is fully discussed in Hyde's International Law, Vol. 11, Sections 763-764.

In concluding the discussion of this subject and of the Hague Convention referred to, Mr. Hyde says:

> "Provision for the detention, or requisition on compensation, of enemy vessels in port, in lieu of confiscation is a mark of respect for private property which should enjoy universal approval. *That respect is not lessened when a detained ship is either appropriated or destroyed, provided the owner is reimbursed for what he has lost in consequence of such action.*" *Vol. 2, Hyde's International Law*, page 522.

While the American delegates did not sign this article for the reason stated,—that it did not go far enough and forbid the detention of enemy merchant ships *altogether*, nevertheless it was a *declaration of international law* approved by practically all other civilized nations of the world, and while it is not binding on the United States *as a treaty*, it is entitled to the same respect as any other established principle of international law.

Mr. James Brown Scott in his introduction to his treaties on "The Hague Conventions," from which we have quoted, says:

> "It should, however, be pointed out that the failure of a belligerent to ratify a particular Convention only means that the Convention *as such* is not binding upon it; it does not mean and cannot mean that the principles of law contained in the Convention may not bind the conduct of the parties. It is, therefore, necessary still further to ascertain whether the provisions of the Convention are merely a codification of international law. In this event the provisions are *binding as international law*, although the Convention itself, or

this part of it, may be ineffective. A careful examination of the Conventions of the two Conferences will show that most of their provisions are declaratory, not amendatory, of international law, and that the failure of one Power or of any number of Powers to ratify them is merely to be regarded as the rejection of a codified text, not as the rejection of principles of international law, *which no power can reject without excluding itself from the society of nations.*"

Aside from the declaration of this Convention, as we have seen, this country is thoroughly committed to the principle that enemy merchants should not be confiscated in belligerent ports on the outbreak of war.

President McKinley allowed Spanish ships thirty days in which to return to their home ports on the declaration of the war against Spain in 1898.

In construing this proclamation, this court, speaking through Mr. Justice Peckham, in the case of *Buena Ventura v. United States,* 175 U. S., p. 384, said:

> "If inferences must be drawn therefrom in order to render certain the limitations intended, those inferences should be, so far as possible, in favor of the claimant in behalf of the owners of the vessel."

And again:

> "It being plain that merchant vessels of the enemy carrying on innocent commercial enterprises at the time or just prior to the time when hostilities between the two countries broke out, would, *in accordance with the later practice of civilized nations,* be the subject of liberal treatment by the Executive, it is necessary when his proclamation has been issued, which lays down rules for treatment of merchant vessels, to put upon the words used therein the most liberal and extensive interpretation of which they are capable; and where there are two or more interpretations which possibly might be put upon the language, the one that will be most favorable to the belligerent party, in whose favor the proclamation is issued, ought to be adopted."

We have already discussed the necessity for an adjudication by a prize court before private enemy property, captured at sea, can be legally confiscated.

This was confirmed by an agreement on October 15, 1907, at the Hague Conference. *Scott's Hague Conventions*, p. 188.

This convention made provision for the creation of an international prize court, which does not, however, interfere with the right of the belligerent captor to have the prize condemned in the first instance in his own court. *Ib.* p. 189.

To adjust the obvious difficulties in the creation of this court, a subsequent meeting was held on September 19, 1910, at which both Germany and the United States (as well as other leading nations) were represented.

The author from whom we are quoting, Mr. James Brown Scott, represented the United States at this conference. *Hague Conventions and Declarations*, pp. 204-208.

It would, therefore, appear that we are committed to this principle by this agreement, as well as by our obligation to observe the principles of international law.

THE ADDRESSES OF THE PRESIDENT AND THE DEBATES IN CONGRESS SHOW THERE WAS NO PURPOSE TO CONFISCATE THIS PROPERTY.

In the President's proclamation of war, on April 6, 1917, he assured all resident enemies that:

> "They shall be undisturbed in the peaceful pursuit of their lives and occupations, and be accorded the consideration due to all peaceful and law abiding persons."

In his address to Congress of April 2, 1917, Mr. Wilson said:

> "We have no quarrel with the German people. We have no feeling towards them but one of sympathy and friendship."

And again:

> "It will be all the easier for us to conduct ourselves as belligerents in a high spirit of right and fairness because we act without animus, not in enmity towards a people or with the desire to bring any injury or disadvantage upon them.
>
> "We are, let me say again, *the sincere friends of the German people,* and shall desire nothing so much as the early re-establishment of intimate relations of mutual advantage between us—however hard it may be for them, for the time being, to believe that this is spoken from our hearts."

In his address to Congress on December 4, 1917, the President said:

> "You catch with me the voices of humanity that are in the air. They grow daily more audible, more articulate, more persuasive, and they come from the hearts of men everywhere. They insist that the war shall not end in vindictive action of any kind; that no nation or people shall be robbed or punished because the irresponsible rulers of a single country have themselves done deep and abominable wrong. It is this thought that has been expressed in the formula, 'No annexations, no contributions, no punitive indemnities.' "

It would be useless to quote the various other addresses of the President in which he expressed the same sentiments. They are a part of the world's history.

In the discussion of this resolution, and the "Trading with the Enemy Act," not a member of the House of Congress expressed the view that private enemy property should be confiscated or taken without compensation. On the contrary, every opinion expressed on the floor of the Congress was to the effect that private property should *not* be confiscated.

The views of members of the Senate are well expressed in the report of the Senate Committee on the "Trading with the Enemy Act" (Senate Report No. 113, 65th Congress, 1st Ses.). This report states in part:

> "Under the old rule warring nations did not respect the property rights of their enemies, but a more enlightened opinion prevails at the present time, and it is now thought to be entirely proper to use the property of enemies *without confiscating it.*"

The report of the Committee on Interstate and Foreign Commerce to the House of Representatives, on June 2, 1920, expresses the view of that body, with reference to private enemy property as follows:

> "It was the intention of Congress when the property was taken that it should merely be held in custody during the war, and that after the war the property or its proceeds *should be returned to the owners.* It has never been the purpose or the practice of the United States to seize the private property of a belligerent to pay our Government's claims against such belligerent. *Such practice is contrary to the spirit of international law throughout the world.*"

It is true that no express provision was made in the joint resolution for the bringing of suits in the Court of Claims or in any other court by the owners of these ships. No such provision was necessary. It already existed under the so-called Tucker Act.

As we have shown, the resolution authorized the seizure of ships, regardless of the interests owned by American citizens or neutrals in such ships. It certainly was not intended by Congress that these interests should be seized without compensation, or without the right to sue in the Court of Claims under the existing law.

No special provision was made for these interests, and no purpose is shown to confer upon the American or neutral owners of interests in these ships and rights not conferred upon the enemy jointly interested in the ownership of any such ships.

In view of the sentiments expressed by the President and Congress at the time of the passage of the joint resolution and the seizure of these ships, we cannot doubt that their purpose was to maintain the highest ideals of modern civil-

ization, and to observe the requirements and obligations of international law and national good faith.

In the light of the struggles made by American statesmen for more than a century to bring about an international agreement to prevent the seizure of private merchant ships at sea by belligerents, we must assume that the President and Congress did not intend to violate the declaration of the Hague Conference that enemy ships in our ports should not be seized at the beginning of war. On the contrary, it is perfectly obvious that Congress and the President intended to comply with that provision of this same declaration which permits the seizure of ship *with the obligation to make compensation therefor.*

AUTHORITIES CITED BY THE COURT OF CLAIMS.

The Court of Claims, in its opinion, states:

> "It was the action taken in virtue of the joint resolution that deprived plaintiff of its property, and the question is whether the circumstances gave rise to the implication of a contract of which the Court of Claims has jurisdiction. Manifestly the joint resolution was an exercise of the war power of Congress. It finds support in the constitutional provision which empowers Congress to declare war and to make rules concerning captures on land and water. Art. 1, No. 8, 11. See Stoehr v. Wallace, 255 U. S. 229-242; Commercial Trust Co. v. Miller, 262 U. S. 51; Brown v. United States, 8 Cranch, 110, 126; Miller v. United States, 11 Wall. 268, 305; Fischer v. Palmer, 259 Fed. 355; Salamandra Ins. Co. v. New York Life Ins. Co., 254 Fed. 852. Several of these cases deal with the trading with the enemy act, but act granted broad powers to the Alien Property Custodian in dealing with enemy property, and if the property involved in this and similar suits had not been taken by the Alien Property Custodian, in which even there would have been no jurisdiction in this court."

Whether this property could be taken over by the Alien Property Custodian under the "Trading with the Enemy Act," is not important. If this had been done, appellant's right to recover in the forum provided in that act could not be disputed.

The property taken over by the Alien Property Custodian was not *confiscated.* It was only taken over and *held in trust* for the owners. The *title* to the property taken over did not pass from the owners or become the property of the United States by virtue of the taking. The property was taken, under that act, not for the use of the United States Government, but was taken over and held temporarily, during hostilities, in order that it might not fall into the hands of the enemies of the United States. *Stoehr v. Wallace,* 255 U. S. 239. *Metropolitan Trust Co. v. Garvan,* 254 U. S. 554.

The Court of Claims cites several cases growing out of the capture by the Federal troops of property during the Civil War. These cases grow out of special statutes, and are not at all applicable. The Civil War legislation is briefly summarized in Vol. 7, Moore's International Law Digest, p. 291, as follows:

> "The Act of August 6, 1861, was passed by Congress in the exercise of its power 'to make rules concerning captures on land and water,' and was aimed exclusively at the seizure and confiscation of property *used in aid of the insurrection.* The act of July 17, 1862, proceeded upon the entirely different principle of confiscating property without regard to its use, *by way of punishing the owner for being engaged in rebellion and not returning to his allegiance.*"

Such legislation was also discussed in the opinion of this Court in *Oakes v. United States,* 174 U. S. 778.

The case of *Hijo v. United States,* 194 U. S. 315, cited by the Court of Claims, is clearly not in point.

The distinctions between that case and this are vital:

(a) The Court, speaking the plaintiff's demand in that case, says:

> "Its claim is not founded on the Constitution of the United States, *or on any Act of Congress,* or on any regulation of any executive department."

In the case at bar, appellant's claim is for property rightfully taken under an executive order based on the joint resolution of Congress:

(b) In the *Hijo* case the property was taken "within the limits of military operations," while the war was flagrant.

In the case at bar the ship seized was in an American port, and at a time when it was protected from *confiscation*, as we have seen, by well established principles of international law.

(c) In the *Hijo* case the court held that if the property taken was not properly confiscated, the taking was tortious for which suit could not be maintained in the Court of Claims. In the case at bar it is conceded that the property was *rightfully* taken under legislative and executive authority.

(d) In the *Hijo* case, the property was only used *temporarily* and was returned to the owners.

In the case at bar, the title to the property was taken over by the United States. The property was turned over to the "Shipping Board" and became permanently the property of the United States.

(e) And finally, the court held in that case that the plaintiff's claim was settled by the treaty of peace between Spain and the United States.

The case of *Herrara v. United States*, 222 U. S. 528, involved practically the same facts and was dismissed for the same reasons assigned in the *Hijo* case.

In the *Herrara case*, the Court called attention to the fact that there was a distinction between the right to seize property for the immediate uses of the army in the field, as was done in that case and the *Hijo* case, and the seizure of property for "booty" or gain. The court said:

> "This is a distinction important to observe, and it is recognized explicitly or implicitly in all the cases referred to in the able argument of counsel."

In the case at bar, the title as well as the possession of the property, was taken and turned over to the "Shipping

Board," with authority to use it in "any service" or in "any commerce, either foreign or coastwise."

APPELLANT'S RIGHTS ARE NOT AFFECTED BY THE TREATY WITH GERMANY IN 1921.

It is true that in the treaty between the United States and Germany, approved by Congress on July 2, 1921 (Sec. 5, 42 Stat. L., Part 2, 1940), Germany assumed to relieve the United States of all obligation with reference to the payment of her nationals for property seized. This was probably intended to apply only to property taken over under the "Trading with the Enemy Act."

This question, however, is not important to this appellant because it was not, at the time the treaty was entered into, or at the time it was ratified, a citizen or subject of Germany, and its rights are not affected by said treaty.

The appellant was a joint stock company, incorporated under the laws of Schleswig-Holstein, and became a subject of the Kingdom of Denmark in the following manner:

In Article 109 of the Treaty of Versailles a plebiscite was provided for the zone in which Apenrade is situated to determine whether that zone should remain as a part of Germany or become territory of Denmark. Under such plebiscite the zone referred to voted to return to Denmark and has now become incorporated as a part of the latter country. By Article 112 of the Treaty of Versailles, it is provided:

> "All the inhabitants of the territory which is returned to Denmark will acquire Danish nationality *ipso facto*, and will lose their German nationality. * * *"

By Article 278 of the Treaty of Versailles, it is provided:

> "Germany undertakes to recognize any new nationality which has been, or may be, acquired by her Nationals under the laws of the allied and Associated Powers and in accordance with the decisions of the competent authorities of these powers, pursuant to naturalization laws or *under Treaty stipulations*, and to regard such persons as having, in consequence of the ac-

quisition of such new nationality, in all respects severed their allegiance to their country of origin."

It cannot, of course, be insisted that the treaty between Germany and the United States affects the rights of any except German nationals. Germany, of course, had no right to speak for, or represent, any others.

At the time this treaty was entered into appellant's property had already been taken under an implied promise to pay, and its rights were vested and fixed. It had, at the time of this treaty, lost its German citizenship and had become a subject of the Kingdom of Denmark, and could be represented alone by that Government. What effect this treaty has upon the rights of those who retained their German citizenship it is not important to consider in this connection.

The Congress of the United States has by express enactment recognized the fact that those occupying appellant's status are not to be treated as German citizens. Subsection 8 of subdivision (b) of Section 9 of the Amendment of June 5, 1920, to the "Trading with the Enemy Act," provides:

> "* * * that no person shall be deemed or held to be a citizen or subject of Germany or Austria or Hungary or Austria-Hungary for the purposes of this Section, even though he *was* such citizen or subject at the time first specified in this subsection, *if he has become, or shall become, ipso facto,* or through exercise of option a citizen or subject of any nation, or state, or free city other than Germany, Austria or Hungary, (first) under the terms of such treaties of peace, as have been, or may be, concluded subsequent to November 11, 1918, between Germany or Austria or Hungary (of the one part) and the United States and or three or more of the following named powers: the British Empire, France, Italy and Japan (of the other part). * * *"

IN CONCLUSION.

We desire to emphasize the fact that the United States did not take over this property *exclusively* for war purposes. It was taken over under the *war power* of Congress,

and its taking was thought proper as a result of the fact that we were at war, but the property was taken over for *permanent use* by the "Shipping Board" with the right to use it in "any service," or "in any commerce, foreign or coastwise." If this property was not confiscated, which it could not have been consistently with the principles of international law and our treaty obligations,—if it was taken with the intention of making compensation, or in such a manner that our treaty obligations or the principles of international law would require compensation,—then, we submit, that under the Tucker Act the appellant was entitled to maintain its action in the Court of Claims. As has been frequently stated by this Court in the cases cited, there is an implied obligation to pay, and a right of action in the Court of Claims, whenever property *lawfully taken* by the United States for its own purposes is taken under such circumstances that "in good conscience" it ought to pay.

Respectfully submitted,

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(The italics used in this brief are ours.)

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APPELLANT'S BRIEF.

Supreme Court of the United States

OCTOBER TERM, 1925

No. 13.3

HAMBURG-AMERICAN LINE TERMINAL & NAVIGATION COMPANY,
Appellant,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

CHARLES H. LEFEVER,
Appellant's Attorney.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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Supreme Court of the United States

OCTOBER TERM, 1925.

No. 108

HAMBURG-AMERICAN LINE TERMINAL & NAVIGATION COMPANY,
Appellant,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FOREWORD.

The Hamburg-American Line Terminal & Navigation Company, the appellant, was incorporated under the laws of the State of New Jersey on October 26, 1899 (R. 1, 4 and 10). It became a subsidiary of the Hamburg-American Line, a German corporation, in that all of the issued and outstanding capital stock of the Hamburg-American Line Terminal & Navigation Company was beneficially held for said German corporation from October, 1899, to December, 1917, when said stock was seized and taken over by the Alien Property Custodian as enemy-owned (R. 1). The

Alien Property Custodian exercised the rights of stock ownership and elected a Board of Directors for Hamburg-American Line Terminal & Navigation Company to manage and control its affairs (R. 1 and 2). The Alien Property Custodian seized no money nor other property belonging to the Hamburg-American Line Terminal & Navigation Company, as such money or other property was recognized as belonging to the corporation and not to its stockholders. Said Board of Directors, charged with the duty of administering the affairs of the Corporation, caused the original petition in this case to be filed in the Court of Claims of the United States on April 5, 1923 (R. 1), so as to bring the claim of appellant against the United States, for property requisitioned by the United States from appellant, within the six-year period allowed for filing claims in said Court under the provisions of Section 156 of the Judicial Code, and, by leave of Court, filed an amended petition in said Court on February 19, 1924 (R. 1).

OPINION DELIVERED IN THE COURT OF CLAIMS.

The Court of Claims of the United States, the court below, issued a short Memorandum upon passing judgment in this case, sustaining the demurrer to the amended petition of claimant below, holding that the Court of Claims is without jurisdiction to hear and determine the case, and, for its reasons in so deciding, making reference to the Court's Opinion in Deutsch-Australische Dampfschiffs-Gesellschaft, No. C-576, decided March 17, 1924, and then, by way of further comment upon its decision, says: "The Congress having provided for the taking of title to the property and the making of compensation to be determined by the President (40 Stat. 459 and 1914), it must be presumed (1)to have intended that all compensation to which plaintiff was entitled be included in the President's award, or (2) to have meant that no compensation was authorized for the prior use of the property." Neither said Memoran-

dum nor said Opinion have been officially reported, but both appear in the printed Record (R. 12-19).

GROUNDS ON WHICH JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES IS INVOKED.

From the judgment rendered on the 17th day of March, 1924, by the Court of Claims, adverse to claimant below (R. 12), claimant below derives its right to an appeal to the Supreme Court of the United States, pursuant to the provisions of Sections 242 and 243 of the Judicial Code and the Rules of the Supreme Court.

Claimant below upon the claim set up in its petition to the Court of Claims prayed for a judgment in its favor against the United States in the sum of $1,147,347.00 (R. 4), and the judgment entered in said Court and appealed from sustained a demurrer to claimant's amended petition and dismissed said petition (R. 12).

Claimant below filed a motion on May 14, 1924, for a new trial, and on May 26, 1924, the Court of Claims filed an order overruling said motion (R. 19). On June 4, 1924, claimant below made application for, and gave notice of, an appeal to the Supreme Court of the United States, both from the judgment of the Court of Claims sustaining defendant's demurrer and dismissing claimant's petition on the grounds that the Court of Claims was without jurisdiction to hear and determine the case and from the order overruling claimant's motion for a new trial; and, on June 16, 1924, the Court of Claims allowed the appeal (R. 20).

Claimant below in its said petition alleged that it is a corporation, created by and existing under the laws of the State of New Jersey, organized October 26, 1899 (R. 1), that many years prior to the United States declaring war upon Germany (April 6, 1917), it acquired title by purchase to and became seized in fee-simple of certain pieces, parcels, or tracts of land and premises, a part of which lie

under water, upon which lands are erected certain piers, warehouses, sheds, office and other buildings and improvements situated in the City of Hoboken, Hudson County, and State of New Jersey, more fully described in "Schedule A" to a Proclamation issued by the President of the United States of Amercia on the third day of December, 1918 (40 Stat. 1914-1918), which said lands and premises on April 6, 1917, had a clear rental value of $2,400.00 *per diem*, that on April 6, 1917, the United States, acting by and through the War Department, entered upon and took possession and control of said lands and premises and on April 20, 1917, acting as aforesaid, made its possession and control thereof exclusive by ejecting claimant therefrom and depriving claimant for all times thereafter from any further use and occupation of said lands and premises, said taking of the possession and control thereof having been accomplished by virtue of directions by the President to the Secretary of War, pursuant to the authority given to the President and the Secretary of War by the Act of Congress of August 29, 1916, c. 418, sec. 1 (39 Stat. 645), that on June 28, 1918, the President, acting under the authority vested in him by Act of Congress of March 28, 1918 (40 Stat. 459) issued a Proclamation (40 Stat. 1804-1805) declaring that the acquisition of title to claimant's said docks, piers, warehouses, wharves and terminal equipment and facilities on the Hudson River, to-wit: in the City of Hoboken, as aforesaid, to be necessary for the national security and defense, and did thereupon take over for the United States the immediate possession and title thereof, including all leaseholds, easements, rights of way, riparian rights and other rights, estates and interests therein, or appurtenant thereto, and he did by said Proclamation (40 Stat. 1804/5) furthermore declare that just compensation for the property thereby taken over would thereafter be determined and paid (R. 2 and 3), that on December 3, 1918, the President issued another Proclamation (40 Stat. 1914-1918) and did deter-

mine and declare therein that the just compensation to be paid to claimant for its said property, expropriated for the United States of America, to be the sum of $2,314,877.00, to be paid to claimant upon the satisfaction of record of all liens by way of mortgage, judgment, or otherwise existing on, and all taxes and assessments due and exigible upon the foregoing premises, or any part thereof, on the 28th day of June, 1918; that said sum of $2,314,877.00 was paid to claimant on January 5, 1919, but that, notwithstanding the payment to claimant of said sum, claimant received no rent or other compensation for the term or time beginning April 6, 1917, when the United States of America entered upon and took possession of claimant's said lands and premises, completed by the said taking pursuant to the Act of Congress of August 29, 1916, when the United States acquired title to said lands and premises under the Proclamation (40 Stat. 1804/5) made pursuant to the Act of Congress of March 28, 1918 (40 Stat. 459) and that although claimant was awarded on December 3, 1918, the sum of $2,314,877.00 for said title expropriated on June 28, 1918, it did not receive payment of said sum until January 5, 1919 (R. 3 and 4), and that claimant, by virtue of the provision contained in the Fifth Amendment to the Constitution of the United States, as expressed in the words "nor shall private property be taken for public use, without just compensation," was warranted in inferring the existence of an agreement on the part of the United States to pay claimant a reasonable price for the use and occupation of its said lands and premises for the term or time aforesaid and to compensate claimant further for the time claimant was deprived of the use of said sum of $2,314,877.00 after the title to said lands and premises was acquired by and passed to the United States (R. 3 and 4).

Upon the claim so presented, the Court of Claims entered its judgment, sustaining the demurrer to the petition and dismissing said petition, said Court holding that it is with-

out jurisdiction to hear and determine the case (R. 12). From the judgment of the Court of Claims, entered March 17, 1924, an appeal to the Supreme Court of the United States was allowed on June 16, 1924 (R. 20), and the appellant asks that said judgment be reversed so that its case may be heard upon its merits and the claimant below be awarded proper compensation.

CASE BELIEVED TO SUSTAIN THE JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES.

The present case comes before the Supreme Court of the United States on an appeal from judgments of the Court of Claims, one (R. 12) entered March 17, 1924, sustaining a demurrer to claimant's petition and dismissing the said petition on the grounds that the Court of Claims is without jurisdiction to hear and determine the case set up in said petition, and another (R. 19) entered May 26, 1924, overruling claimant's motion of May 14, 1924, for a new trial. This case, therefore, comes before the Supreme Court of the United States in practically the same manner as did the case of A. W. Duckett & Co., Inc., v. United States (58 Ct. Cl. 234, 403), which was dismissed April 16, 1923, by the Court of Claims for want of jurisdiction, after findings of fact by the Court of Claims, and with respect to which a motion for a new trial was overruled May 28, 1923, by the Court of Claims upon the same grounds. In dismissing the Duckett case for want of jurisdiction, the Court of Claims held that the circumstances of the case did not justify the implication of a contract on the part of the United States to pay the plaintiff for the use of its property acquired by the United States under said Act of August 29, 1916 (39 Stat. 645). From the judgments of the Court of Claims dismissing plaintiff's petition for want of jurisdiction and overruling plaintiff's motion for a new trial, plaintiff was allowed an appeal to the Supreme Court of the United

States, where the appeal was heard and decided, the judgment below being reversed, with directions to the Court of Claims to award proper compensation to the appellant (45 S. Ct. 38). In the present case, there were no findings of fact, as the dismissal for want of jurisdiction was by a judgment on demurrer, but under the established rules of pleading the facts alleged in claimant's petition were regarded, for the purpose of trying the issue raised by the demurrer, as true, and said facts, concisely stated above, make the present case with respect to the taking of claimant's property pursuant to the Act of Congress of August 29, 1916 (39 Stat. 645), almost analogous to the case of A. W. Duckett & Co., Inc., other than that claimant in the instant case was the absolute owner of the property taken, while plaintiff in the A. W. Duckett & Co., Inc., case held but a leasehold interest in the property taken.

In the case of A. W. Duckett & Co., Inc. (45 S. Ct. 38), Mr. Justice Holmes, among other things, said:

> "The Court of Claims dismissed the petition for want of jurisdiction, upon the ground that the facts found excluded, as matter of law, the possibility that a contract should be implied and that therefore there could be no claim.
>
> * * * * * * *
>
> "Whatever the effect of the taking there was a contract implied in fact by the President's order and there is no doubt concerning the jurisdiction of the Court of claims. United States v. North American Transportation & Trading Co., 253 U. S. 330, 40 S. Ct. 518, 64 L. Ed. 935."

As the Supreme Court has the sole right to pass upon the question of its own jurisdiction to entertain appeals invoking such jurisdiction, and it assumed jurisdiction to hear and determine the appeal so brought by A. W. Duckett & Co., Inc., the appellant in the present case, presenting in its appeal points of fact and of law quite analogous to those

in the case so heard and determined, believes the case of A. W. Duckett & Co., Inc., sustains the jurisdiction of the Supreme Court to hear and determine appellant's case.

STATEMENT OF CASE

Suit was instituted in the Court of Claims of the United States on April 5, 1923 (R. 1), by appellant, claimant below, filing in said Court a petition alleging, among other things, the following pertinent facts:

That Hamburg-American Line Terminal & Navigation Company, the claimant, is a corporation created by and existing under the laws of the State of New Jersey, organized on the 26th day of October, A. D. 1899 (R. 1); that long prior to the United States declaring war upon Germany claimant by purchase acquired title to certain pieces of land and premises situated in the City of Hoboken, N. J., which, on April 6, 1917, had a *per diem* rental value of $2,400.00 (R. 2), that on April 6, 1917, the United States, acting by and through the War Department, took possession of said lands and premises and on April 20, 1917, made said possession exclusive by ejecting claimant therefrom and depriving claimant at all times thereafter from the use and occupation of said lands and premises, the Secretary of War, upon directions from the President, having taken possession and assumed control thereof, through the Quartermaster General, New York, under authority given by Act of Congress of August 29, 1916, c. 418, sec. 1 (39 Stat. 645), (R. 2), that on June 28, 1918, the President, acting under authority vested in him by Act of Congress of March 28, 1918 (40 Stat. 459), issued a Proclamation (40 Stat. 1804/5) declaring the acquisition of said title to be necessary to the national security and defense and taking over for the United States said title, just compensation for the property to be determined and paid later (R. 2-3), that on December 3, 1918, the President issued another Proclamation (40 Stat. 1914/8) fixing the compensation to be paid

to claimant for its said property at $2,314,877.00, to be paid to claimant upon the satisfaction of record of all liens by way of mortgage, judgment, or otherwise, existing on, and all taxes and assessments due and exigible upon the premises, or any part thereof, on June 28, 1918, that on January 5, 1919, said sum of $2,314,877.00 was paid to claimant (R. 3), that notwithstanding the payment to claimant of said sum of $2,314,877.00, claimant received no rent or compensation for the term beginning April 6, 1917, when the United States took possession of said lands and premises, and ending June 28, 1918, when the United States acquired title to said lands and premises (R. 3), that claimant received no interest on said sum of $2,314,-877.00 from June 28, 1918, when the United States acquired title to the said lands and premises, to January 5, 1919, when said sum of $2,314,877.00 was paid by the United States to claimant (R. 3), that by way of said rent and interest claimant is entitled to receive $1,147,347. (R. 4), that claimant is the sole owner of the claim, that no assignments or transfer thereof or of any part thereof, or interest therein has been made (R. 4), and that claimant as a citizen of the United States has at all times borne true allegiance to the Government of the United States and has not in any way voluntarily aided, abetted or given encouragement to rebellion against the United States (R. 4).

On May 26, 1923, the defendant filed a demurrer to said petition (R. 12), the demurrer being worded, as follows:

> "Defendant demurs to the petition in the above entitled case for the reason that it does not state a cause of action against the United States" (R. 12).

On March 17, 1924, the Court of Claims entered an order, as follows:

> "This case was submitted upon the defendant's demurrer to the plaintiff's amended petition. On consideration whereof, the court being of opinion that the de-

murrer is well taken, it is adjudged and ordered this 17th day of March, 1924, that the said demurrer be and the same is sustained, and the amended petition is dismissed" (R. 12).

SPECIFICATION OF ERRORS

1. The Court of Claims committed error in sustaining defendant's demurrer to claimant's amended petition and dismissing said petition.

2. The Court of Claims committed error in holding that it is without jurisdiction to hear and determine claimant's case.

3. The Court of Claims committed error in applying to its decision of claimant's case the reasons upon which it decided the case of Deutsch-Australische Dampfschiffs-Gesellschaft, No. C-576, decided March 17, 1924.

4. The Court of Claims committed error in holding it it must be presumed, the Congress having provided for the taking of title to the property and the making of compensation to be determined by the President (40 Stat. 459 and 1914), (1) to have intended that all compensation to which plaintiff was entitled be included in the President's award, or (2) to have meant that no compensation was authorized for the prior use of the property.

ARGUMENT

I

The Court of Claims committed error in sustaining defendent's demurrer to claimant's amended petition and dismissing said petition. Said demurrer, filed May 26, 1923, reads as follows:

> "Defendant demurs to the petition in the above-entitled case for the reason that it does not state a cause of action against the United States" (R. 12).

This demurrer in form and substance is a general demurrer, raising but a single issue, to wit: Assuming the facts alleged in the petition to be true, do they state a cause of action by claimant against the United States?

With respect to the effect of a demurrer, it is first a rule that a *demurrer admits all such matters of fact as are sufficiently pleaded.* A demurrer is, consequently, an admission that the facts alleged are true; and, therefore, the only question for the Court is whether, assuming such facts to be true, they sustain the case of the party by whom they are alleged (Stephen on Pleading, 143). The facts alleged in claimant's petition show that the United States took for its use, by means of separate acts of taking, valuable property of claimant. The first of said separate takings gave the United States temporary control over claimant's property in the Port of New York upon the arising of a national emergency, a declaration of war. The second of said takings, pursuant to the provisions of the Act of Congress of August 29, 1916, c. 418, sec. 1 (39 Stat. 645), gave to the United States the use of said property, for the transfer or transportation of troops, war material and equipment, or for such other purposes connected with the then existing emergency as were needful, and for the use so acquired and enjoyed for more than a year claimant received no compensation. The third of said takings, under the Act of Congress of March 28, 1918 (40 Stat. 1804/5) vested the title, as well as the possession, of said property in the United States, for which claimant received an award of $2,314,877.00 but not until more than six months after the taking of said title. It is submitted that any of these takings, which, without fault of the claimant or assertion of adverse title by the Government, deprived claimant of the use and possession of its property, under proper legislative authority and executive acts, created an obligation on the part of the Government to make just, full and complete compensation to claimant, said obligation arising under the provisions of the Fifth Amendment to the Consti-

tution of the United States, and this obligation it has been held in a long line of cases, including the following:

U. S. v. Russell, 13 Wall. 623.
U. S. v. Great Falls Mfg. Co., 112 U. S. 645.
U. S. v. Lynah, 23 S. Ct. 349.
DeCamara v. Brooke, 135 Fed. 384.
U. S. v. Buffalo Pitts Co., 34 S. Ct. 840.
U. S. v. North American Transportation & Trading Co., 40 S. Ct. 519.
A. W. Duckett & Co., Inc., v. U. S., 45 S. Ct. 38.

is sufficient to support an implied promise on behalf of the Government to pay just compensation for the property taken, provided the taking was duly authorized by the Government and did not sound in tort. Such implied promise brings appellant's case within the class of claims founded upon implied contracts, which the Court of Claims derived jurisdiction to hear and determine under the Act of Congress (10 Stat. 612), approved February 24, 1855, providing for the organization of the Court of Claims, and such jurisdiction has at no time subsequently been taken away from said Court.

The takings of appellant's said property for governmental use, as alleged in the petition, are, with respect to their effects, two classes of takings: one that without giving compensation deprived appellant of the use and occupation of its real property for a term beginning April 6, 1917, and ending June 28, 1918, and the other that without giving compensation deprived it of the use of $2,314,877.00 for a term beginning June 28, 1918, and ending January 5, 1919. It nowhere appears in the record that the Government was without due authority to deprive appellant of either use of its property, to meet and supply a governmental need or use, it nowhere appears in said record that the Government in either of said takings asserted an adverse claim to said property, against the property rights of appellant, but it does appear that appellant, a citizen or subject of the

United States, was deprived by the Government of the use of appellant's said property, and it appears further in said record that the use and occupation of said real property for the term beginning April 6, 1917, and ending June 28, 1918, was taken by the Government, pursuant to the provisions of the Act of Congress of August 29, 1916, c. 418, sec. 1 (39 Stat. 645), and that the taking of claimant's title to said real property by the Government was pursuant to the authority given in the Act of Congress of March 28, 1918 (40 Stat. 1804/5), and it appears also in said petition that said property, when taken, for the term beginning April 6, 1917, had a per diem rental value estimated at $2,400 and that no compensation has at any time been awarded or paid to appellant by the Government for the use and occupation of said property from April 6, 1917, to June 28, 1918, and although the Government paid claimant $2,314,877.00 as compensation for the title taken on June 28, 1918, the same was not paid over to claimant until January 5, 1919, whereby claimant lost the use of said compensation for more than six months. It is submitted, therefore, that if either the taking of such use and occupation for more than a year before the title to said property was acquired or the withholding of the compensation for more than six months after title was acquired constituted a taking sufficient to warrant the Court of Claims in finding the elements of contractual liability present, the demurrer to the petition should not have been sustained with respect to any taking that created an obligation on the part of the Government to make compensation; for by the facts alleged in the petition, in setting up two separate acts or kinds of taking, one pursuant to the provisions of said Act of Congress of August 29, 1916 (39 Stat. 645) and the other pursuant to the provisions of the Act of Congress of March 28, 1918 (40 Stat. 1804/5), said petition presented two statements of facts in the nature of two separate counts, and if one of said counts only is defective, the

Court should have given judgment for the claimant upon the good count.

If a demurrer be too large, that is, if it be pointed to all the counts of the statement of the case, where one of them only is defective, the Court will give judgment upon demurrer for the plaintiff, notwithstanding the defective count—Stephen on Pleading, 145.

The rules of the Court of Claims require that a petition must set forth "A plain, concise statement of the facts, giving venue and date, free from argumentative, irrelative and impertinent matter"—Rules of the Court of Claims, Rule 15 (2)—and rules of good pleading hold that it is not necessary to state such circumstances as merely tend to prove the truth of the fact, and that less particularity is required in alleging facts when they lie more in the knowledge of the opposite party than they do in the knowledge of the party pleading—Stephen on Pleading, 342, 370.

If the Court of Claims had not sustained the demurrer to the petition, so as to have permitted appellant to present testimony in proof of its case, the alleged fact that the Government had taken appellant's property, pursuant to the provisions of the Act of Congress of August 29, 1916 (39 Stat. 645), could have been fully proven by placing in evidence a letter written April 16, 1917, by Newton D. Baker, Secretary of War, to The Depot Quartermaster, New York (through The Quartermaster General) advising that under authority of the Act of Congress of August 29, 1916 (39 Stat. 645), the President directs that The Depot Quartermaster take possession and assume control, for the purposes stated in said Act of Congress, and to utilize the same to the exclusion of all other traffic, of appellant's said property, and directing The Depot Quartermaster to notify the persons in possession of said property, and the owners thereof, if known, of the contents of the order and to furnish them with copies of the same, and appellant could further offer in evidence written notice from The Depot Quartermaster, New York, to appellant, giving said notice.

It is submitted that the Court of Claims committed error in sustaining defendant's demurrer to claimant's amended petition and dismissing said petition.

II

The Court of Claims committed error in holding that it is without jurisdiction to hear and determine claimant's case.

The Court of Claims is a court of limited statutory jurisdiction. In the instant case it is contended that on the facts, as set forth in the appellant's amended petition in the Court of Claims, that the case comes within the jurisdiction of the Court of Claims, both as regards person and subject matter.

The only limitation on the jurisdiction of the Court of Claims with reference to persons as proper party claimants is Section 155 of the Judicial Code. This Section is a re-enactment of Section 1068 R. S. and provides:

> "Aliens who are citizens or subjects of any government which accords to citizens of the United States the right to prosecute claims against such government in its courts, shall have the privilege of prosecuting claims against the United States in the Court of Claims, whereof such court, by reason of their subject-matter and character, might take jurisdiction."

This provision of the Judicial Code raises the question of a claimant's nationality as a jurisdictional consideration. The appellant and claimant herein is a corporation organized and existing under the laws of the State of New Jersey.

Corporate nationality generally is fixed by the country and state of incorporation. In Insurance Company v. Francis (11 Wall. 210), this Court, by Justice Davis, said:

> "This, in legal effect, is an averment that the defendant was a citizen of New York, because a corpora-

tion can have no legal existence outside of the sovereignty by which it was created."

In Shaw v. Quincy Mining Company (145 U. S. 444; 12 S. Ct. 937), appears the following: :

> "This statement has been often reaffirmed by this court, with some change of phrase, but always retaining the idea that the legal existence, the home, the domicile, the habitat, the residence, the citizenship of the corporation can only be in the state by which it was created, although it may do business in other states whose laws permit it."

As regards the question of corporate nationality, more particularly with reference to jurisdiction of the Court of Claims under the Tucker Act, Judge Rogers, of the Second Circuit, in U. S. v. N. Y. & O. Steamship Company (216 Fed. 61), said:

> "A corporation is a citizen of the country or state by which it was incorporated and it has its residence in such country or state and not elsewhere."

It is clear, therefore, that the appellant corporation is a national of the United States by reason of its incorporation in the State of New Jersey. It is also clear that there is no ground on which the jurisdiction of the Court of Claims could be denied because of the lack of a proper party claimant on the ground of alienage within the meaning of Section 155 of the Judicial Code as set forth above.

It is contended also that the Court of Claims has jurisdiction of the subject matter and character of the claim in the instant case.

It is a fundamental proposition of law that a sovereign state may not be sued in its own courts without its consent (Haycraft v. U. S., 22 Wall. 81), which consent may be granted upon such terms and conditions as the sovereign state may deem appropriate (Schillinger v. U. S., 155 U. S.

163; 15 S. Ct. 85). Prior to the year 1855, the Government of the United States withheld its consent to be sued, and up to that time a claimant against the United States had recourse only to a direct appeal to the bounty of Congress. Under the Act of February 24, 1855 (10 Stat. 612), Congress, in providing for the organization of the Court of Claims, gave qualified consent to suits being brought against the United States, in defining the jurisdiction of the newly organized Court of Claims as follows:

> "The said court shall hear and determine all claims founded upon any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the government of the United States, which may be suggested to it by a petition filed therein; and also all claims which may be referred to said court by either house of Congress."

By the Act of March 3, 1863 (12 Stat. 765), the jurisdiction of the Court of Claims was enlarged by the following provision:

> "That the said Court * * * shall also have jurisdiction of all set-offs, counter-claims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever, on the part of the government against any person making claim against the government in said court."

The Act of March 3, 1887 (24 Stat. 505), known as the Tucker Act, further enlarged the jurisdiction of the Court of Claims so as to include "all claims founded upon the Constitution of the United States."

The jurisdiction of the Court of Claims to hear and determine appellant's case is covered by the jurisdiction given said Court in Section 145 of the Judicial Code, as follows:

> "All claims (except for pensions) founded upon the Constitution of the United States or any law of Con-

gress, upon any regulation of an Executive Department, upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable."

2 U. S. Comp. St. 1916, Sec. 1136, p. 1468.

While the Court of Claims has assumed jurisdiction in few cases based solely upon the Constitution of the United States, nevertheless the Constitutional ground has been included as a constituent element in the Court of Claims assuming jurisdiction of cases raised partly on other grounds, particularly on that of an implied contract. The Court of Claims in deciding the present case upon demurrer, made reference in its Memorandum (R. 12), for its reasons, to its Opinion in the case of Deutsch-Australische Dampfschiffs-Gesellschaft, No. C576, decided March 17, 1924, and in said Opinion the Court said:

> "As already stated, the taking of private property for public use by the government, and for which the Fifth Amendment requires compensation to be made, falls within the class of claims founded upon implied contract, and the duty imposed by this amendment is an essential element in raising the necessary implication of an agreement to pay" (R. 16).

In the United States v. North American Transportation and Trading Co. (40 S. Ct. 519), Mr. Justice Brandeis said:

> "When the government, without instituting condemnation proceedings, appropriates for a public use under legislative authority private property to which it asserts no title, it impliedly promises to pay therefor."

From this and other cases, defining and construing the jurisdictional powers of the Court of Claims, it clearly ap-

pears that the ground on which jurisdiction of the Court of Claims is most frequently assumed is that of implied contract, and it further appears that an implied contract may not be set up for jurisdictional purposes without satisfying certain elements of contractual liability or establishing the bases on which the implication of contract can rest. These bases may include either a Constitutional basis, as the Constitutional prohibition against the taking of private property for public use without just compensation, or a legislative basis, as the taking of private property under the exercise of authority provided by appropriate legislation.

In the present case, it is submitted that the facts alleged in claimant's petition present a foundation, including both the Constitutional and the legislative bases, to support an implied contract, thereby bringing claimant's case within the statutory jurisdiction of the Court of Claims.

III.

The Court of Claims committed error in applying to its decision of appellant's case the reasons upon which it decided the case of the Deutsch-Australische Dampfschiffs-Gesellschaft, No. C-576, decided March 17, 1924 (R. 13-19). The legislative basis relied upon in that case upon which to found elements of contractual liability was the Joint Resolution of May 12, 1917 (40 Stat. 75), while in appellant's case the legislative bases upon which to found the elements of contractual liability in the Government taking claimant's property are the Act of Congress of August 29, 1916 (39 Stat. 645), a legislative basis held by the Supreme Court in the case of A. W. Duckett & Co., Inc., v. U. S. (45 S. Ct. 38) sufficient to sustain the elements of contractual liability and to give to the Court of Claims jurisdiction to hear and determine the case as founded upon implied contract, and the Act of Congress of March 28, 1918 (40 Stat. 459), which expressly provided for the giving of just compensation. The Court of Claims erred in sus-

taining the demurrer to claimant's petition and dismissing said petition, provided either the taking of the use and occupation of claimant's property by the United States under the Act of Congress of August 29, 1916 (39 Stat. 645), afforded such legislative basis, or if this long delay in giving compensation to claimant after the taking of the title to claimant's property under the Act of Congress of March 28, 1918 (40 Stat. 459) afforded such basis, for the facts alleged in the petition set up two distinct takings, one the use and occupation of appellant's real property and the other the use of the compensation awarded for appellant's title to said property, and in the nature of two counts in said petition appellant sought just compensation for each and/or both of said takings, and, if appellant made out in its said petition a cause of action against the United States within the jurisdiction of the Court of Claims under either of the takings alleged in said petition, the demurrer should have been overruled and appellant's case should have been heard and determined under the good count.

In said Opinion (R. 13-19), to which the Court of Claims makes reference in its Memorandum (R. 12) for its reasons in deciding it is without jurisdiction to hear and determine the instant case, the Court says:

> "It was the action taken in virtue of the joint resolution that deprived plaintiff of its property, and the question is whether the circumstances gave rise to the implication of a contract of which the Court of Claims has jurisdiction. Manifestly the joint resolution was an exercise of the war power of Congress. It finds support in the constitutional provision that empowers Congress to declare war and to make rules concerning captures on land and water. Art. 1, Par. 8, cl. 11. See Stoehr v. Wallace, 255 U. S. 239; Commercial Trust Co. v. Miller, 262 U. S. 51; Brown v. United States, 8 Cranch 110, 126; Miller v. United States, 11 Wall. 268, 305; Fischer v. Palmer, 259 Fed. 355; Salamandra Ins. Co. v. New York Life Ins. Co., 254 Fed. 852. Several of these cases deal with the trading with the

enemy act, but that act granted broad powers to the Alien Property Custodian in dealing with enemy property, and if the property involved in this and similar suits had not been taken, as it was, it could admittedly have been taken by the Alien Property Custodian, in which event there would have been no jurisdiction in this court" (R. 15).

The "Trading With the Enemy Act" (40 Stat. 411) has been held, in the cases cited which have reference to it, to be an exercise of the war power of Congress, finding support in the Constitutional provision that empowers Congress to declare war and to make rules concerning *captures* on land and water (Art. 1, sec. 8, cl. 11), but none of said cited cases construe either the Act of August 29, 1916 (39 Stat. 645) or the Act of March 28, 1918 (40 Stat. 459) to be an exercise of the war power of Congress, so supported. A "capture," in technical language, is a taking by military power (U. S. v. Athens Armory, 24 Fed. Cas. 878, 880), and it is the taking of property by one belligerent from another (In re: Whitfield, 11 Ct. Cl. 444, 456). The taking of property by the United States of a citizen or subject of the United States could not be termed "capture," in the technical use of the term, but would be a "seizure" or "taking," and it is submitted that such seizure or taking by the United States of the property of its citizen or of its subject would not be a "capture" within the meaning of the term "captures" as used in Art. 1, sec. 8, cl. 11, of the Constitution of the United States. Appellant, claimant below, is a citizen or subject of the United States, having been since October 26, 1899, a corporation created by and existing under the laws of the State of New Jersey (R. 1). The property which the United States took from claimant was real estate, upon which was erected piers, warehouses, sheds, office and other buildings (R. 2). The last part of the above quotation from said Opinion reads: "if the property involved in this and similar suits had not been taken, as it was, it could

admittedly have been taken by the Alien Property Custodian, in which event there would have been no jurisdiction in this Court." Said real estate should not be included with said property, as the Alien Property Custodian had no authority under the "Trading With the enemy Act" (40 Stat. 411) to take or seize the property of an American corporation. In the case of Behn, Meyer & Co., Ltd., v. Miller, et al. (45 S. Ct. 165), Mr. Justice McReynolds, delivering the Opinion of the Court, said:

> "Before its passage the original Trading With the Enemy Act was considered in the light of difficulties certain to follow disregard of corporate identity and efforts to fix the status of corporations as enemy or not according to the nationality of stockholders. These had been plainly indicated by the diverse opinions in Daimler Company, Limited, v. Continental Tyre & Rubber Company, etc., 2 A. C. (1916) 307, decided June 30, 1916.
>
> "Section 7, subsection (c), was never intended, we think, to empower the President to seize corporate property merely because of enemy stockholders' interests therein. Corporations are brought within the carefully framed definitions (section 2) of 'enemy' and 'ally of enemy' by the words: Any corporation incorporated within such territory of any nation with which the United States is at war (or any nation which is an ally of such nation) or incorporated within any country other than the United States and doing business within such territory. And we find no adequate support for the suggestion that Congress authorized the taking of property of other corporations because one or more stockholders were enemies. Logically carried out this view would have permitted the seizure of all property of companies incorporated by any associated power—*e. g.*, Great Britain—solely because some German held one share of the many thousands. The result indicates that the premise is bad. What the President might do was plainly set down in well-considered words."

From the definitions of "enemy" and "ally of enemy," given in the last quotation, special attention is called to the words: "or incorporated within any country other than the United States and doing business within such territory." It may be held that a corporation incorporated in the United States could carry on business within the territory of a nation with which the United States was at war and not be an "enemy" or "ally of enemy" as those terms are used in the "Trading With the enemy Act." Said Act made it unlawful for any person in the United States, except with the license of the President granted to such person, to trade with an enemy or ally of enemy, and any person violating the provision of the Act could be punished, under the provisions of the Act, but such person's property was not authorized to be seized by the Alien Property Custodian as *enemy* property. Corporations incorporated within the United States can under no circumstances be brought within the terms "enemy" or "ally of enemy" as used in said Act. The Court of Claims, therefore, could not properly include appellant's property when it says (R. 16): "In the instant case the court is asked to order compensation for *enemy* property seized by authority of a legislative act that is silent on the question of jurisdiction." Said real estate of appellant in no sense came within the terms and provisions of said Joint Resolution of May 12, 1917 (40 Stat. 75), and said sum of $2,314,877.00, which became due and payable to claimant on June 28, 1918, had no relation to said Joint Resolution.

As appellant was not an *enemy,* being an American corporation, and its property when taken by order of the President was not vessel property, but real estate, to which the Joint Resolution of May 12, 1917, has no application, appellant's case is clearly distinguishable from the case of said Deutsch-Australische Dampfschiffse-Gesellschaft (R. 13 and 19) and the reasons governing the decision of the Court of Claims in the latter case are irrelevant and not properly applicable to appellant's case.

IV.

The Court of Claims committed error in holding it must be presumed, the Congress having provided for the taking of title to the property and the making of compensation to be determined by the President (40 Stat. 459 and 1914), (1) to have intended that all compensation to which plaintiff was entitled be included in the President's award, or (2) to have meant that no compensation was authorized for the prior use of the property.

The alternative presumptions of Congressional intent indulged by the Court of Claims with reference to compensation for the use of appellant's property prior to taking of title to said property by the United States Government are without foundation and in contravention of the clear wording of the statute.

The fact that the Court of Claims allowed itself to speculate as to Congressional intent to compensate shows that the Court felt itself to be on very uncertain ground. The further fact that the Court indulged itself in alternative and mutually exclusive presumptions of legislative intent, tends to accentuate the evidences of this uncertainty. In reference to the uncertainty incidental to the use of presumptions, the Court, in Western Maryland Railroad Company v. Shivers, 61 Atl. 618, 620; 101 Md. 391, says:

> "A 'presumption' is simply an inference or conclusion logically deduced from known data.' It follows that, when contradictory conclusions are asserted as resulting from the same premises, one or the other or possibly both must be erroneous."

In Rodan v. St. Louis Transit Company, 105 S. W. 1061, 1066, 207 Mo. 392, the Court comments as follows on the basis underlying presumptions:

> "The basic principle upon which presumptions are built is philosophically related to the doctrine of faith.

'Now faith is the substance of things hoped for, the evidence of things not seen.' "

It is contended that the Court of Claims committed error in having recourse to the above mentioned presumptions as to legislative intent to compensate, in view of the clear wording of the statute and its application to the facts of the appellant's case.

On August 29, 1916, the Congress passed an Act (39 Stat. 645), in anticipation of the war situation and providing for the possession and use by the Government of transportation systems in time of public emergency.

Prior to April 6th, 1917, the appellant, as a national of the United States and doing business within the territorial jurisdiction of the United States in accordance with the laws of the State of New Jersey and the United States, was undisturbed in its possession and title to certain lands and premises in the City of Hoboken, Hudson County, and State of New Jersey. On April 6, 1917, the United States, acting by and through the War Department and under the authority given by the Act of Congress of August 29, 1916 (39 Stat. 645), entered and took possession of appellant's property. Soon thereafter, on the 20th day of April, 1917, the Government made its possession and control thereof exclusive by ejecting the appellant from its said lands and premises. The United States, through its duly authorized agents, continued in the use and control of the appellant's lands and premises under the authority of the Act of August 29, 1916 (39 Stat. 645), for more than a year before it acquired appellant's title thereto under the authority given by the Act of March 28, 1918 (40 Stat. 459), which is silent with respect to the taking of said use and control under the earlier Act.

The Act of Congress of March 28, 1918 (40 Stat. 459), making appropriations to supply certain deficiencies in appropriations for the fiscal year ending June 30, 1918, contained the following provisions:

"The President is authorized to acquire the title to the docks, piers, warehouses, wharves, and terminal equipment and facilities on the Hudson River now owned by the North German Lloyd Dock Company and the Hamburg-American Line Terminal and Navigation Company, two corporations of the State of New Jersey, if he shall deem it necessary for the national security and defense: *Provided,* That if such property cannot be procured by purchase, then the President is authorized and empowered to take over for the United States the immediate possession and title thereof. If any such property shall be taken over as aforesaid, the United States shall make just compensation therefor, to be determined by the President. Upon the taking over of said property by the President, as aforesaid, the title to all such property so taken over shall immediately vest in the United States."

In pursuance of the authority so given, the President, by a proclamation dated June 28, 1918 (40 Stat. 1804/5) declared that the acquisition of the appellant's terminal equipment and facilities was necessary for the national security and defense and immediately took title to said premises.

On December 3, 1918, the President, still expressly acting under the authority of the Act of March 28, 1918, issued another proclamation (40 Stat. 1914/8) with an attached "Schedule" describing the appellant's property and premises and determining and fixing the just compensation to be paid to appellant for the same in the sum of $2,314,877.00.

From the foregoing brief summary of material facts, it is clear that the appellant was deprived of the actual possession and use of its property under the authority of the Act of August 29, 1916 (39 Stat. 645). It is to be noted, however, that this Act merely authorized the seizure of possession of the appellant's property, still leaving it vested with the title to said property. This situation continued up until June 28, 1918. During this period of more

than a year, the appellant was deprived of the use and occupation of its said property, but continued to hold title to said property. This separation of the possession and the title of the property during said period was recognized by Congress, for Congress, in full knowledge of the possession of the appellant's property by the United States, under the Act of August 29, 1916, passed the Act of March 28, 1918 (40 Stat. 459), authorizing the President to acquire *title* to the appellant's property, under certain conditions.

The section of the Act of March 28, 1918, quoted above, empowered the President to take over title to said property and to make just compensation therefor. The Act also provided that immediately upon the taking over of said property by the President, the *title* to all said property was to immediately vest in the United States. It is important to note that the Act of August 29, 1916, authorized the seizure of the possession of appellant's property and that the Act of March 28, 1918, dealt exclusively with the title to certain designated properties, including the appellant's. As the United States had already been in possession of appellant's property for more than a year prior to the President's proclamation under the Act of March 28, 1918, the only effect of said proclamation was to vest in the United States the title to said property. The President by his proclamation (June 28, 1918), under the limited authority of the Act of March 28, 1918, took over for the United States only the title to the appellant's property and by subsequent proclamation (December 3, 1918), fixed the compensation he was authorized to determine. By the clear and unequivocal wording of said Act of March 28, 1918, such compensation was limited to the expropriation of title under said Act. This statute and the proclamations made pursuant thereto make no reference whatsoever to the prior use of the property by the Government under the authority of the Act of August 29, 1916. There was no necessity that any such reference should be made, as the appellant was already in possession of an ade-

quate remedy for the prior loss of mere possession, since it might file for the taking under the Act of August 29, 1916, its petition in the Court of Claims on the ground of an implied contract within the meaning of Section 145 of the judicial code, thereby recovering the losses it sustained by reason of the use and occupation of the Government prior to the expropriation of the title to its property. That seizures effected under the Act of August 29, 1916, are within the jurisdiction of the Court of Claims on the ground of a contract implied in fact appears from the holding of this Court in the Ducket case, 45 S. Ct., 38. In that case, the claimant filed its petition in the Court of Claims to recover the value of a leasehold interest in a pier, of which it had been deprived by the action of the President under the Act of August 29, 1916. The Court of Claims dismissed the petition for want of jurisdiction. Claimant appealed to this Court, and this Court reversed the judgment of the Court of Claims, saying:

> "Whatever the effect of the taking there was a contract implied in fact by the President's order and there is no doubt concerning the jurisdiction of the Court of Claims. United States v. North American Transportation & Trading Co., 253 U. S. 330, 40 S. Ct. 518, 64 L. Ed. 935."

After an examination of the language of the two statutes, said Acts of August 29, 1916, and March 28, 1918, and the holding of this Court in the Duckett case, it is difficult to escape the conclusion that the said alternative presumptions of the Court of Claims are entirely unfounded.

The first presumption, to the effect that "it (Congress) must be presumed to have intended that all compensation to which plaintiff was entitled be included in the President's Award," finds no basis of support in either one of the statutes. The Act of August 29, 1916, was clearly limited in the scope of its application to the possession and the use

of the property in question. The Act of March 28, 1918, was passed in full contemplation of the then existing situation with reference to the continued occupation and use of said property by the Government, and was clearly limited to the transfer and evaluation of the title to the said property. The *res*, or the subject matter of the taking under the Act of March 28, 1918, was the title to the properties in question, in contradistinction to the use and occupation of said property, which had already been obtained by the Government and used by it for over a year under the Act of August 29, 1916. The taking of the title was conditioned upon "just compensation therefor." It would seem to be clear, therefore, from the unambiguous wording of the Act of March 28, 1918, that the President was empowered merely to make "just compensation" for the *res* taken under said Act, and also that the President was limited to making just compensation for the title to the said property as of June 28, 1918. Any implication that the intent of Congress extended beyond such clearly described *res* finds no basis in fact. Furthermore, there is no sound policy to be satisfied by reading such an intent into the statute.

The alternative presumption, that Congress must be presumed "to have meant that no compensation was authorized for the prior use of the property," is equally without foundation in the wording of the statutes, and is clearly opposed to the holding of this Court in the Duckett case. It is also significant that in the Duckett case this Court, by Mr. Justice Holmes, took occasion to expressly disavow an unwarranted assumption of legislative intent by the Court of Claims. In the Opinion of the Court of Claims in that case, a laborious argument was evolved to support the conclusion that it was not the intent of Congress that the Act of August 29, 1916, should include the taking of a leasehold interest. In this connection, Mr. Justice Holmes, in reversing the Court of Claims both on the point of jurisdiction and that of legislative intent, says: "We can see

no ground for attributing to the United States the extraordinary intent to recognize and pay for other interests but to exclude claimant."

That Congress meant no compensation was authorized for the prior use of the property cannot be presumed from the silence of the Act of March 28, 1918, with respect thereto. Such silence can raise only the presumption that Congress meant appellant should be compensated for such prior use as others whose property was taken under the Act of August 29, 1916, would be compensated. An intention to confiscate such use can be presumed only when there are words to give rise either expressly or impliedly to such presumption.

Respectfully submitted,

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